Robin Transportation, Ltd. *and* Janette Serrano *and* Delores Johnson. Cases 29–CA–15547 and 29–CA–15893

February 11, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 29, 1992, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify the remedy,[2] and to adopt the recommended Order.

We agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off and discharged employee Janette Serrano because of her support for Local 1181 and to prevent her from voting in the upcoming representation election. In finding that the Respondent had knowledge of Serrano's support for Local 1181, the judge relied on Respondent Agent[3] Irwin Cohen's statements to Serrano that he knew she was on the other side[4] and to wait until March 15 (the date of the election) after which he would get her a better run. He also relied on Serrano's February 19, 1991 protest to the Respondent's president, Jeff Cohen, that she knew nothing about a union or medical benefits offered through a union. The judge found that as a result of that protest the Respondent believed Serrano was a supporter of Local 1181, rather than Local 917, the union favored by the Respondent. In agreeing with the judge that the Respondent knew of Serrano's support for Local 1181, we do not rely on Serrano's protest to the Respondent's president that she knew nothing about a union or medical benefits offered through a union. Rather, we find that Irwin Cohen's statements to Serrano that he knew she was on the other side, and that she should wait until March 15, after which he would get her a better run, clearly show the Respondent's knowledge of Serrano's support for Local 1181.

The Respondent contends that the judge erroneously credited Serrano's testimony that on February 20 and 21 Irwin Cohen specifically referred to March 15 (the date of the election) when he told her to wait until after that date when he would get her a better run. The Respondent contends that Cohen could not have referred to March 15 at that time because the election date was not determined until February 25, 1991, the date that the Regional Office sent a letter formalizing the election arrangements. In support of this argument the Respondent attached a copy of the February 25 letter to its brief in support of exceptions. Although the letter formalizes the arrangements, it does not preclude the possibility that the election date was set prior to February 20 and that Cohen was aware of the date at that time. We also find it significant that the Respondent did not call Irwin Cohen as a witness to rebut Serrano's testimony about his alleged reference to March 15, and did not present evidence at the hearing regarding the date that the election arrangements were determined. In view of the Respondent's failure to present such evidence, we see no reason to disturb the judge's crediting of Serrano's testimony.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Robin Transportation, Ltd., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Amy S. Krieger, Esq., for the General Counsel.
Charles H. Rosenberg, Esq. (Goetz, Fitzpatrick & Flynn), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed in Case 29–CA–15547 by Janette Serrano, an individual, the Regional Director for Region 29 issued a complaint and notice of hearing on April 25, 1991,[1] alleging that Robin Transportation, Inc. laid off and subsequently discharged Serrano, because Serrano supported or assisted Local 1181–1061, Amalgamated Transit Union, AFL–CIO (Local

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. I, par. 11, of his decision, the judge inadvertently stated that ''Cohen'' responded that she did not want a raise in pay, when in fact it was employee Delores Johnson who so responded.

[2] The judge incorrectly cited *F. W. Woolworth Co.* and *New Horizons for the Retarded*. The correct citations are *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] The judge erroneously stated that Irwin Cohen is an officer of the Respondent. The parties stipulated that Cohen is an officer of Robin Bus Company, Inc., and an agent of the Respondent.

[4] The judge inadvertently stated that Cohen also told Serrano that he knew she ''was with the other union.'' Serrano credibly testified that Cohen stated that he knew she ''was on the other side,'' but did not testify that he referred to ''the other union.''

[1] All dates hereinafter unless otherwise indicated are in 1991.

1181 or the Union) and in order to prevent Serrano from voting in an election scheduled involving Respondent's employees.

Pursuant to charges and amended charges filed in Case 29–CA–15893, by Delores Johnson, an individual, the Regional Director issued a complaint and a notice of hearing on September 26, alleging in substance that Respondent violated Section 8(a)(1) of the Act by warning and admonishing Johnson concerning her support and involvement with Local 1181, threatening her with less favorable treatment because she had supported Local 1181, and Section 8(a)(1) and (4) of the Act by conditioning her future employment with Respondent and her recall from layoff status, on her withdrawal of the unfair labor practice charges that she filed in Case 29–CA–15883.

On January 7, 1992, the Regional Director issued an order consolidating the above two cases for trial, which was heard before me on May 11, 1992, in Brooklyn, New York. Briefs have been filed by Respondent and the General Counsel and have been carefully considered. Based on my review of the entire record,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a limited partnership existing by virtue of the laws of the State of New York, with its principal office and place of business on Neptune Avenue in Brooklyn, New York, where it is engaged in the business of providing ambulette and bus transportation services. During the past year, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000, and purchased and received at its Neptune Avenue facility parts and other goods and materials valued in excess of $50,000 directly from enterprises located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Local 1181 is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

Facts

Respondent is engaged in the business of transporting preschool handicapped children to and from schools and day programs. It employs approximately 60 employees, which includes drivers and matrons or escorts who perform this work in minivans, which accommodate 18–20 passengers. Robin Bus Company, Inc. is an affiliated company and a single integrated enterprise with Respondent, located at the same facilities, and is engaged in the business of transporting handicapped adults to and from hospitals, doctors' offices, and clinics in ambulettes, which employs approximately 10 drivers.

Generally, the drivers for Respondent will pick up the vehicle at Respondent's facility and pick up the matron on route to the first stop. Occasionally, the matron will come to the facility at the start of the day and begin the run with the driver.

Irwin Cohen known as ''Wimpy'' and Jeffrey or Jeff Cohen are father and son, and officers and agents of both Respondent and Robin Bus.

Serrano and Johnson were both employed by Respondent as matrons, commencing in September 1989 and September 1988, respectively. According to the contradicted testimony of Johnson and Serrano, they were not aware of any union representing the employees of Respondent or Robin Bus until after Local 1181 began its organizing campaign in November 1990.

Serrano signed a card for Local 1181; distributed cards to and solicited other employees to join, Local 1181 during the months of December 1990 and January and February 1991; and attended a union meeting held on February 1991 at a diner on Cropsey Avenue in Brooklyn. These conversations and solicitations for the Union all took place away from the premises of Respondent, mainly in Coney Island where Serrano lives. Jeff Cohen testified that he had no knowledge of whether Serrano distributed any cards for Local 1181 or of any other activities by her on behalf of any union. Irwin ''Wimpy'' Cohen did not testify.

In December 1990, Johnson was approached by Jeff Cohen in the garage area of the shop. Cohen told Johnson that ''he has a union, Local 917.'' Cohen informed Johnson that Local 917 offered benefits, including a $10,000 life insurance coverage, and eye and dental coverage. Johnson replied that this wasn't enough coverage for her because she had five children and needed more coverage. Cohen added that if she joined Local 917, she would have to pay dues and her pay would therefore go down. Johnson responded that she couldn't afford to lose any pay, and did not want to sign up for Local 917 because it didn't benefit her.[3]

On December 28, 1990, Local 1181 filed a representation petition in Case 29–RC–7762, seeking to represent various classifications of Respondent's employees including drivers and matrons.

On January 9, 1991, Johnson was informed by her driver that he had been instructed to bring her to see Anthony to sign up for a union. After her run was completed, she was brought to Respondent's facility to the office. Present were Anthony Ciro, the dispatcher for the ambulette drivers, her driver, an ambulette driver, and Jeff Cohen. Johnson asked Cohen, ''Jeff, did you want me''? Cohen replied no, but that Anthony wanted her. Ciro told Johnson in Cohen's presence that Respondent was going to become a unionized shop, and everyone working there had to be in the Union. He handed Johnson a card and a checkoff authorization for Local 917, IBT (Local 917). Johnson asked what kind of coverage Local 917 offered and whether it included vacation, sick days, and a raise in pay. Ciro replied no. Cohen then chimed in that busdrivers and matrons did not get these benefits. Johnson then asked how much money would be deducted from her salary and how long she had before she had to join the

[2] Although every apparent or nonapparent conflict in the evidence may not have been specifically resolved here, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is discredited.

[3] As noted, this was the first time that Johnson, who had been employed since September 1988, had been told or heard about Respondent having a union.

Union. Ciro replied that $20 a month would be deducted from her pay and that she would have 90 days to join. Johnson responded that she could not afford to lose $20 from her pay, and did not want to sign to join Local 917.

At that point, Jeff Cohen asked Johnson to follow him out of the office and into the garage. Cohen told Johnson, ''Delores, you know I can say I never said this.'' Johnson replied that she knew. Cohen then informed her that Local 1181 was trying to get in and was a better union for the drivers and matrons, but their demands were too high. Cohen added maybe Respondent could do something to prevent the drop in pay if she joined Local 917. Cohen responded that she didn't want a raise in pay, but just wanted to wait.

On January 18, a hearing was held at the Regional Office on the representation petition filed by Local 1181. Local 917 was permitted to intervene at the hearing on the basis of its purported collective-bargaining agreement with Respondent, which both Local 917 and Responded asserted as a bar to the petition. Local 1181 contended that the contract could not constitute a bar to an election, because it had not been enforced. During the course of the hearing, Respondent and Local 917 refused to comply with the hearing officer's repeated direction to submit a complete unredacted copy of the collective-bargaining agreement to a witness for identification, because of their concerns that Local 1181 would receive a copy of the agreement, which Local 917 and Respondent considered confidential. In view of this position taken by Respondent and Local 917, the Regional Director concluded in a Decision and Direction of Election, issued on February 6, that the record was insufficient to establish the existence of adequate contract constituting a bar to the petition. Accordingly, an election was directed in a unit consisting of all drivers, matrons, mechanics, assistant dispatchers, and dispatchers employed by the Employer (Respondent and Robin Bus) at its facilities in Brooklyn, New York.

Respondent received a copy of the Decision and Direction of Election on or about February 12, and an election was subsequently scheduled for March 15, with both Local 917 and Local 1181 appearing on the ballot.

As noted, on February 14, Serrano attended a union meeting at a diner. During this meeting, the business agent for Local 1181 informed the employees present that an election would be held sometime in March.

Meanwhile, in early January, Serrano applied to Medicaid for health insurance benefits. At that time, she brought a form from Medicaid to Respondent, and gave it to Respondent's clerical staff to be filled out. She received the form in an envelope from one of Respondent's secretaries, and without opening the envelope or reading the form, submitted it to Medicaid. Two to three weeks later she received a letter from Medicaid rejecting her application for benefits. Sometime in February, Serrano went to the Medicaid office to find out why she had been rejected. She was told that Respondent had indicated on the form that she was covered by a union benefit plan. She replied that she never knew of any union and didn't know why Respondent had said that she was covered by a union. She asked for and received a copy of the form filled out by Respondent, which indeed indicated that group health insurance was available for Serrano and her family at no cost to the employee, ''through union.'' Interestingly, although the form also calls for more specific details concerning the alleged coverage, such as the name and address of the insurance carrier, policy number, group number, and the types of medical services covered, these portions of the form were left blank.

On or about February 12, Serrano showed the form to Irwin ''Wimpy'' Cohen and told Wimpy that she was rejected by Medicaid, because Respondent had put ''Union'' on the form. Wimpy told Serrano to wait until his son Jeff returned from vacation and speak to him about it. Thus, on February 19, Serrano showed Jeff Cohen the letter and informed him that she had been rejected for medical benefits because Respondent had stated on the form that there was a union. She added that she didn't know anything about a union, and asked why he had said so on the form. Jeff Cohen replied that there was a union, but he was not supposed to tell her about it, and suggested that she see Anthony, the dispatcher about it.

The next morning, February 20, Serrano went to see Jeff Cohen. She asked Cohen to change her run or give her another driver, because she didn't care for the way her driver, Hector Velez, drove the vehicle, and because they didn't get along with each other. Cohen told Serrano that he couldn't change her route at that time, but asked her to make her request in writing so that he would have it on record. Cohen gave her a pen and paper and dictated to her what she should write. The document, dated February 20, reads: ''To whom it may concern. I Janette Serrano cannot get along with my driver, Hector Velez.''

That same afternoon, at the completion of the run, after all the children were dropped off, Velez lit up a pipe and began to smoke. Serrano asked Velez to stop smoking because it was making her sick.[4] Velez replied that he would not stop and continued to smoke. Serrano then called Jeff Cohen on the radio and told him that Velez was smoking on the bus, that she was pregnant, and that it was making her sick. Cohen asked to speak to Velez and inquired if there were any children on the bus. Velez said no. Cohen told Velez and Serrano to come in after their run to speak to him.[5]

On the way back to the garage, the van driven by Velez with Serrano stopped at a gas station to fill up with gas. Serrano saw another van of Respondent's, driven by ''Francois'' with Johnson as matron, and asked to ride back to Respondent's premises with them while Velez finished putting gas in the van. They agreed and transported Serrano to Respondent's facility, where she spoke with Jeff Cohen in the presence of Wimpy Cohen. Jeff Cohen informed Serrano that he would have to lay her off. She asked what for? Cohen replied that he had received a complaint. Serrano inquired if it was a complaint about her or her driver Velez. Cohen did not answer, and at that moment Velez pulled up, and Cohen went over to speak to him.

Wimpy Cohen then took Serrano over to the side, put his arm around her, and told her not to worry and to wait until after March 15,[6] after which he promised to get her a better run. Cohen added that in the meantime she could go on Medicaid. Serrano asked why she was laid off? Cohen re-

[4] On prior occasions, Serrano had asked Velez not to smoke on the bus, and Velez would reply that he knew but he would from time to time keep a cigar in his mouth but would not light it.

[5] Contrary to the testimony of Cohen, I credit the testimony of Serrano, corroborated by Johnson who heard the exchange over the radio, that there was no yelling or screaming during this incident.

[6] As noted, March 15 was the date of the election.

sponded that she should come in the next day and talk to him.

The next day, February 21, Serrano returned to the facility, as she had been instructed to do by Wimpy Cohen. She was accompanied by her boyfriend Roberto Diaz, who although not in the room at the time, overheard part of the conversation between Serrano and Wimpy Cohen through the open door. Serrano again asked Cohen why she was laid off, because she still wanted to work. Wimpy Cohen told Serrano that he knew that she was on the other side and was with the other union, and that he had told her to wait until after March 15, and he would get her a better run. Serrano insisted that she still wanted to work. Cohen concluded the conversation by telling Serrano to return the next week when his son Jeff would be there.

On February 25, Serrano obtained a letter from Carol Magaro, program coordinator for Lou Memorial Child Center, which is the client of Respondent that Serrano serviced. The letter indicates that she received no complaints from parents, nor did she make any complaints to Respondent regarding the performance of Serrano as a bus matron on the vehicle which transported children to its program.[7]

The next day, February 26, Serrano returned to Respondent's facility accompanied by Diaz, and met with Jeff and Wimpy Cohen. Serrano again asked why she was being laid off because Respondent received a complaint and asked for a letter for unemployment giving the reasons. Jeff Cohen replied, ''Just put down lack of work.'' Diaz asked how Respondent could say lack of work, when Respondent hired someone else to do her run. Wimpy Cohen responded that it was none of Diaz' business; it was Respondent's business. Diaz reminded Serrano that she also needed the letter for Medicaid and housing. Cohen replied that he would prepare a letter stating the last day of her employment, and if anyone wanted to know the reason for the layoff, they could call him. Cohen told her to come in the next day to pick up the letter.

The following day, February 27, Serrano sent Diaz to pick up the letter, because she had to go to Medicaid. When Diaz brought the letter to her, it was in an envelope. When Serrano opened it, she read it, and the letter stated (for the first time) that Serrano was terminated on February 20, and if anyone required further information, he (Jeff Cohen) should be contacted. Serrano was quite surprised to learn that she had been terminated. She immediately called Jeff Cohen and asked why he had put terminated on the letter, when he had previously told her that she had been laid off. Cohen replied, ''It means the same thing.'' Serrano responded that according to her terminated means fired, and if she was fired where was her last check. Cohen answered that she could come in latter that day to pick up her check.

As instructed, Serrano returned to the facility with Diaz later that day. Jeff Cohen was not present, so Serrano informed Wimpy Cohen that his son had put down in the letter that she was terminated, and she was there to pick up her check. Wimpy Cohen reacted with shock and surprise to the news that she had been terminated, but he reminded her that he had told her to wait until after March 15 and ''not to look for trouble.'' Serrano replied that she was tired of waiting and that she still wanted to work. The above description of the various conversations between Serrano and the Cohens is based on a synthesis of the credited testimony of the various witnesses who have testified. I have generally credited the testimony of Serrano whom I found to be a straightforward, candid, and believable witness, as opposed to Jeff Cohen whose testimony was not impressive. Significantly, Serrano's testimony was essentially corroborated by Diaz, while Wimpy Cohen did not testify here. Thus, the statements attributed to him, which I have related above, were not denied.

Jeff Cohen did testify concerning the decision to discharge Serrano, which he asserts that he made on February 20. According to Jeff Cohen after he heard over the radio, ''arguing and screaming going on in the vehicle . . . which jeopardizes the safety and operation of the vehicle,'' he decided that both Velez and Serrano would have to be discharged immediately. Cohen added that he did not know, nor would it have mattered whether there were children on the bus at the time of the incident. With respect to the alleged ''arguing and screaming,'' Cohen, when further pressed, admitted that he just heard some ''quarreling.'' ''I couldn't make out what was going on.'' He further admitted that he could not understand any of the words used by either Velez or Serrano.[8]

At the hearing, for the first time, Cohen testified to some additional instances of Serrano's alleged unacceptable conduct, which presumably also contributed to the decision to discharge her. Thus, about 6 months prior to her discharge, in about September or October 1990, Diaz was to become involved in an altercation with one of Respondent's mechanics, and Diaz was removed from the shop. Cohen, at that time, told Serrano that she must keep personal matters out of Respondent's business and that Diaz had disrupted Respondent's operations.

Cohen also testified that he had received complaints from other drivers that Serrano was difficult to work with and had a volatile nature. According to Cohen, he received such a complaint about Serrano from driver Vinny DiGeorge in September 1990 and from Mario Ochiogrosso in May 1989. Cohen admits that he never spoke to Serrano about or disciplined her based on these alleged complaints. Cohen also admitted that it was not uncommon for drivers to complain about matrons and for matrons to complain about drivers in Respondent's employ.

Cohen also conceded that Respondent has in the past received requests from employees to be transferred to another run, and that he would accommodate such requests, if he felt ''it was in the best interest of the Company,'' and in fact that he has in the past granted such requests for a transfer of routes. Cohen furnished no testimony as to why he did not believe it was in the best interest of Respondent to transfer Serrano to another route, as she had requested.

[7] As noted, Serrano had been informed by Jeff Cohen on February 20 that she was being laid off, because Respondent received a complaint.

[8] According to Respondent's position paper submitted by its attorney to the Region, Serrano was discharged because she was ''involved in loud and seemingly uncontrolled bickering, in violation of an essential company rule, which requires that operators and escorts working on a bus must perform their respective functions in a quiet, disciplined manner, with complete concentration on the children on the bus, on each child who enters and departs from the bus.'' The letter added that the employees must perform their function in a ''calm, orderly manner . . . to assure that the children are not frightened and are properly attended to.''

As I have described above, Jeff Cohen testified that on February 20, after hearing the alleged ''quarreling'' between Velez and Serrano, he decided to discharge both of them at that time. He further testified that he instructed his father Wimpy to carry out his order to discharge Velez and Serrano on February 20 when they come in from their run, and that to the best of his knowledge, they were discharged on that day. However, Cohen did not testify as to how he acquired the knowledge that Velez or Serrano was terminated on February 20, and no payroll records or other evidence was presented to establish his contention in this regard. As detailed above, Wimpy Cohen did not testify, so he did not corroborate Jeff's testimony that either Serrano or Velez was terminated on February 20.

According to Cohen, the only employees discharged by Respondent from February 1991 to the end of 1991 were Velez and Serrano. However, in the winter of 1991, a driver and a matron employed by Respondent, left a young child on a bus, went to breakfast, and returned and found the child crying. Neither the driver nor the matron was terminated by Respondent as a result of this incident.

On March 15, the NLRB election was held, in which Delores Johnson acted as the observer for Local 1181. The results were 22 votes for Local 1181 and 43 votes for Local 917. On May 6, Local 917 was certified as the collective-bargaining representative for Respondent's employees in the appropriate unit.

Two days after the election, Johnson telephone Jeff Cohen. She congratulated him for winning the election, and added that she knew that he was mad at her, but she was only trying to better her benefits to raise her children. She added that when she would ask him for a raise, he would answer that she was already the highest paid matron and that she made too much money. Cohen responded that Johnson shouldn't have involved herself with the Union, because he had done favors for her. He reminded her that he had allowed her daughter to work in her place so she wouldn't lose any pay, when she had to attend a funeral.

A few minutes after this conversation ended, Jeff Cohen called Johnson and told her to call his father. She did so and Wimpy asked what she had told Jeff. She related the conversation as outlined above, and added that she favored Local 1181, because it gave more benefits than Local 917. She asked if she was still working, and Wimpy told her to come to work or see him on Monday.

Subsequently, Johnson was transferred from working on the Lou Memorial Child Care Center run to the Brookdale Hospital run. On July 24, Johnson was laid off from work at the end of the Brookdale seasonal run. She wrote to Local 917 complaining about both the transfer and the layoff. A grievance was subsequently filed concerning these matters by Local 917. At a grievance meeting held on July 24, it was agreed that Johnson would be compensated an extra $15 per week to make up for the extra work caused by the transfer. Respondent would not terminate the employee employed on Johnson's previous run, and told Johnson to ''collect unemployment.''

On July 30, 1991, Johnson filed an unfair labor practice charge in Case 29–CA–15883 alleging in substance that Respondent transferred and subsequently laid off Johnson because of her activities on behalf of Local 1181. A copy of the charge was served on Respondent by registered mail on July 31.

On August 3, Johnson was called by Mario Ambrosio, an official of Local 917, and told to meet him at Respondent's premises. During the course of their discussing Johnson's grievance concerning her transfer and layoff, Jeff Cohen made reference to the Board charges. He told Johnson to leave the premises, because she had gone to the Labor Board. Cohen added that she was not to report to work until the Labor Board case was settled, even if there was work for her in September.

Johnson was subsequently recalled to work at the Brookdale run on September 20.[9] She was called by Ambrosio of Local 917 and asked if she wanted to return to work. However, according to Johnson, the Brookdale run had started the week before, on September 13, and another matron had been employed for that week.[10] Cohen testified on the other hand that Johnson was recalled to work in September on the first day that the Brookdale run began. No payroll records or other evidence was introduced by either party as to when the Brookdale run began in September 1991, or whether Johnson was recalled at that time.

II. ANALYSIS

A. *Case 29–CA–15547*

In analyzing the above case under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), it first becomes necessary to decide whether the General Counsel has established that union activity was a motivating factor in Respondent's decisions to lay off and terminate Serrano.

In that connection, Respondent argues strenuously that no such finding is warranted because the evidence does not show that Respondent was aware of any union activities engaged in by Serrano. Respondent observes correctly that all the union activities engaged in by Serrano, i.e., her signing a union card, soliciting other employees to sign cards, and attending a union meeting, all took place outside the premises of Respondent. Respondent additionally observes that it employs 70–80 employees, and the employees spend very little time at its facility. Accordingly, Respondent argues that there is no basis in the record for inferring knowledge of Serrano's union activity. I do not agree.

I note initially that it is well settled that direct evidence is not the only means by which an employer's knowledge of union may be established. Knowledge may also be inferred from all the circumstances. *Dentech Corp.*, 294 NLRB 924, 955 (1989); *NLRB v. Fred Stark*, 525 F.2d 422, 431 fn. 8 (2d Cir. 1975). I conclude that the record contains ample evidence, which compellingly establishes that Respondent knew, or at the very least suspected,[11] that Serrano was a supporter

[9] Serrano has not been recalled to work.

[10] Johnson did not testify as to how she knew the run had been staffed by someone else for a week, nor did she know the name of the matron whom she claims replaced her for that 1 week.

[11] It is clear that the requirement of employer knowledge of union activities is satisfied where the General Counsel proves that the em-

Continued

of Local 1181 and was not in favor of Local 917, the incumbent Union, which the record demonstrates Respondent preferred.

Thus, on February 19 (the day before her layoff), Serrano after being rejected for Medicaid benefits, because Respondent had falsely indicated on a Medicaid form that she was receiving medical benefits under a union plan, protested to Jeff Cohen that she did not know anything about a union, and questioned why Cohen had said so on the form. Cohen insisted that there was a union, but that he was not supposed to tell her about it. It is noteworthy that this conversation took place a week after Respondent had received a Decision and Direction of Election from the Region finding that contrary to the assertion of Respondent and Local 917, the contract allegedly in force between them did not constitute a bar to an election. It is especially noteworthy that during the course of the representation hearing, held on January 18, Local 1181 took the position that the contract asserted by Local 917 and Respondent to be a bar to an election was not enforced. Thus, when Serrano on February 19 told Cohen that she knew nothing about a union or any medical benefits from the Union, she was clearly supporting the position taken by Local 1181 at the hearing, i.e., that the contract between Respondent and Local 917 had not been enforced. Accordingly, I conclude that as a result of this incident, Respondent believed that Serrano was a supporter of Local 1181 and was not in favor of Local 917, the incumbent union preferred by Respondent.

Even more substantial evidence of Respondent's knowledge of Serrano's union activities is demonstrated by the remarks made to Serrano by Respondent's officer, supervisor, and agent Wimpy Cohen. I have found above, based on the credited undenied testimony of Serrano, that after she was informed of her layoff on February 20 by Jeff Cohen, Wimpy Cohen took her aside and told her not to worry, and to wait until after March 15 (the date of the election) after which he promised to get her a better run. The next day when Serrano again spoke to Wimpy Cohen to inquire why she was laid off, Wimpy told her that he knew that she was on the other side and was with the other union, and again urged her to wait until after March 15. These statements of Wimpy Cohen, particularly his remarks that Serrano was on the other side and was with the other Union, are more than sufficient to establish that Respondent knew or at least believed that Serrano was a supporter of Local 1181 and did not support Local 917. *Van Dyne Crotty Co*., 297 NLRB 899 (1990); *Pinkerton's Inc*., 295 NLRB 538 (1989); *Respond First Aid*, supra.

Additionally, the record reveals, as noted that Serrano was laid off on February 20, 1 day after the incident involving the Medicaid form, where she protested that she knew nothing about Local 917, thereby inferentially supporting Local 1181 as I have found, 1 week after the Decision and Direction of Election was issued, and less than a month before the election was scheduled to be held. This highly suspect timing of the layoff, and the subsequent discharge, lends substantial support to the General Counsel's prima facie case that protected conduct was a motivating factor in these decisions. *Respond First Aid*, supra; *Vemco, Inc*., 304 NLRB 911 (1991); *Resolute Realty Management Corp*., 297 NLRB 679 (1990).

Moreover, the statements made to Serrano by Wimpy Cohen on February 20 and 21 to the effect that Serrano should not worry about her layoff and to wait until after March 15 (the date of the election) at which time she would get a better run[12] and his making reference to her being on the other side and with the other Union constitutes persuasive evidence of animus toward the Union as well as evidence of discriminatory motivation.

I, therefore, conclude that the General Counsel has established a strong prima facie case that Respondent laid off Serrano on February 20, because it believed her to be a supporter of Local 1181, and to prevent her from voting in the March 15 election, and then when she refused to willingly accept this layoff and persisted in demanding explanations for the layoff, Respondent terminated her because of her perceived support for Local 1181 and her failure to support Local 917.

In light of the General Counsel's strong prima facie showing of discrimination, the Respondent's burden under *Wright Line*, supra, to demonstrate by a preponderance of the evidence that it would have taken the same actions against Serrano absent her union activities, is heavy and substantial. *Vemco*, supra; *Resolute Realty*, supra.

I find that Respondent has fallen far short of meeting its burden in that regard. Respondent contends and Jeff Cohen testified that it terminated Serrano on February 20 because of the ''yelling and screaming'' that Cohen overheard over the radio during the alleged confrontation between Serrano and Velez on that day. However, because I found above that in fact there was no yelling or screaming during this ''confrontation,'' and that in fact Serrano was not discharged on February 20, but only laid off until after the election, Respondent's defense fails to withstand scrutiny based on the findings above.[13]

Moreover, it is highly significant that although Respondent asserts that it discharged Serrano for her actions during this argument with Velez, at no time did it ever inform her that this was the reason for Respondent's decision. I note in this connection that even when it first notified Serrano of its decision to terminate rather than lay her off by letter dated February 26, and given to her boyfriend on February 27, the reason for its action was not given, although Respondent knew that Serrano was pressing it for an explanation of why she had been laid off. Respondent's failure to disclose to Serrano at the time of discharge, or at any other time, the asserted reason for its decision, substantially detracts from Respondent's ability to meet its *Wright Line* burden, that it would have terminated her absent her protested conduct. *Hudson Neckwear*, 302 NLRB 93 (1991).

ployer suspects or believes that the employee is engaged in such activities. *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990).

[12] I note that Wimpy Cohen's promise to assign Serrano to a better run, if she accepted her layoff and not return until after the election (thereby not voting in the election), could be construed as an unlawful promise of benefit in violation of Sec. 8(a)(1) of the Act. However, because the complaint does not so allege, and no such contention was made by the General Counsel, I do not deem it appropriate to make such a finding. However, I can and do rely on this statement to establish animus and discriminatory motivation.

[13] I again emphasize the significance of Resondent's failure to call Wimpy Cohen as a witness, its representative who according to Jeff Cohen discharged Serrano and Velez on February 20.

Indeed, not only did Respondent never inform Serrano of this asserted reason for the discharge, but in fact it initially told her she would be laid off until after March 15 (the date of the election), because of an alleged complaint about her that Respondent had allegedly received. When Serrano would not willingly accept this layoff (with a promise of a better run, when she returned after the election), and obtained a letter from the customer that she serviced that no such complaints were made to Respondent about her, Respondent changed its story again, and asserted that she was laid off for lack of work. When Serrano, through her boyfriend, questioned this explanation, because someone else had taken over Serrano's route, Respondent promised a letter explaining the layoff. As noted, this letter for the first time changed Respondent's action from layoff to termination and gave no reason. Additionally, at trial Respondent, by Jeff Cohen, testified to some additional alleged reasons for the discharge, which had never been mentioned either to Serrano or in Respondent's position paper submitted to the Region, as having any bearing on the decision. Thus, Cohen testified to an incident involving Serrano's boyfriend disrupting the premises, and alleged complaints made about her by two other drivers.[14] In this regard, the Board has long held that when an employer vacillates in offering a consistent explanation for its actions, an inference is warranted that the real reason for its actions is not among those asserted. *Resolute Realty*, supra; *Kenrich Petrochemicals*, 294 NLRB 519, 533 (1989), *P*I*E National*, 282 NLRB 1060, 1064–1065 (1987).

I, therefore, conclude that it is appropriate to draw such an inference in this case, which also substantially detracts from the validity of Respondent's defense and its attempt to meet its *Wright Line* burden of proof.

Respondent places its principal reliance in defending its actions on its assertion that it discharged Velez at the same time and for the same reason as it did Serrano, i.e., the ''dispute or ''fracas'' between them on the bus on February 20. In that connection, Respondent argues that this fact ''dispels beyond any question the notion that the February 20th incident was not the precipitating cause of Ms. Serrano's discharge.'' I disagree with both Respondent's analysis of the facts, as well as its conclusions to be drawn from such facts even if these facts were found as Respondent claims. Once again, I note that I have found, contrary to Respondent's assertion, that it has not established that Serrano was discharged on February 20, and that she was only laid off at that time until after the election. I am also not persuaded that Respondent has established by a preponderance of the evidence that it discharged Velez on February 20 or at any time for that matter.

In that regard, Respondent's only evidence consists of Jeff Cohen's testimony that he instructed his father Wimpy to discharge both Serrano and Velez on February 20, and that to the best of his knowledge, they were discharged on that day. Cohen did not even testify as to how he acquired this knowledge, or even that he had spoken to his father about whether these instructions were carried out. More significantly, Wimpy Cohen did not testify, Respondent gave no reason that it did not call him as a witness, and thus there is no reliable evidence on this record that Velez was discharged on February 20 or at any time. Indeed, because I have found above that Wimpy Cohen did not inform Serrano that she was discharged on September 20, as Jeff Cohen claims he so instructed his father, it is reasonable to assume, which I do particularly in the absence of Wimpy's testimony, that Velez was not so informed as well.[15] I also note that Respondent introduced no payroll or other records which could easily have established that Velez was discharged on February 20 as it claims.

Moreover, even if it is found that Respondent did in fact terminate Velez on that date or thereafter, this would not be sufficient in itself to meet Respondent's *Wright Line* burden. Thus, it is conceivable that Respondent may have had other reasons for wanting to discharge Velez, and that it used the opportunity of his confrontation with Serrano to also rid itself of an employee whom it believed supported the Union at the same time. In that regard, Serrano complained to Jeff Cohen that Velez was an unsafe driver, and related in her testimony an incident where a customer complained to Wimpy Cohen about Velez' driving.

Additionally, I conclude that there is little question that Velez was clearly the instigator of whatever argument ensued between her and Serrano, because he was violating Respondent's rule against smoking on the bus. I credit Serrano in this regard, and conclude contrary to Jeff Cohen's testimony that Respondent prohibited smoking in the bus at any time regardless of whether there were any children on the bus. The testimony of Jeff Cohen with respect to this issue is disingenuous and unpersuasive. Thus, he testified that it was not against Respondent's policy for Velez to smoke on the bus, and that he didn't even inquire about that.[16] Jeff Cohen also testified that it didn't matter to him whether there were children on the bus at the time of the argument between Velez and Serrano, as an apparent justification to support his denial that he asked about that subject. However, this position is contrary to his own attorney's position paper as well as common sense. Thus, the position paper emphasized that the employees must perform their functions ''in a quiet disciplined manner, with complete concentration on the children in the bus, on each child who enters and departs from the bus to assure that the children are not frightened and are properly attended to.''

Although it is of course true that in some circumstances conduct that occurs on the bus between employees could be so serious that one might conclude that such behavior would be likely to reoccur when children were present. However, that is certainly not the case here, and for Jeff Cohen to insist that the presence of children on the bus at the time would not have mattered at all is simply not believable and symptomatic of much of his testimony. Clearly, whether children were present at the time of the argument would have

[14] I would also note that these instances all allegedly occurred several months before the discharge. No disciplinary action was taken against Serrano at the time of these incidents, and Cohen admits that he never even spoke to Serrano about the alleged complaints of other drivers about her.

[15] It would also be appropriate to draw an adverse inference from Respondent's failure to call Wimpy Cohen, that his testimony would not have been favorable to Respondent on this point, as well as to other matters pertaining to him including his conversations with Serrano. *Redwood Empire*, 296 NLRB 369 (1989); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

[16] Note that I have found above that Cohen did in fact ask whether there were children on the bus at the time.

had some bearing on how serious Respondent would have viewed the argument. Based on the position paper, it is obvious that whatever the extent of the confrontation, Respondent would have considered it to be a more serious transgression if it had happened in the presence of children.

Respondent also emphasizes the alleged necessity for the matron and driver to get along with each other, and points to Serrano's own request for another driver as an admission that this was the case. However, Cohen admitted that Respondent has in the past granted requests of an employee to change drivers or routes, ''if it is in the best interests of the Company.'' Here, although Serrano had asked to be switched to another route (primarily because of Velez' driving) Cohen gave no testimony as to why he did not grant her request in the first place (before the argument) or after the confrontation between Velez and Serrano. In this regard, it is especially significant that Wimpy Cohen initially told Serrano that he would get her a better run, if she would willingly accept her layoff and not return until after March 15 (the day of the election). Thus, Wimpy Cohen and Respondent obviously felt that it was ''in the interest of the company'' not only to change her route but also to promise her a better run, but only if she accepted her layoff and presumably did not vote in the election.

Moreover, the fact that Velez, even if he was terminated at the same time as Serrano, and for the same reason, may not have been a union supporter does not meet Respondent's burden of proof. Thus, where as here, there is strong evidence of animus, and the explanations given for the discharge of Serrano are not credible, the fact that an employee (Velez) other than solely the employee who engaged in protected activity (Serrano) was discharged does not preclude a finding of discriminatory intent. *Consumers Asphalt Co*., 295 NLRB 749, 752 (1989); *Alliance Rubber Co*., 286 NLRB 645, 647 (1987).

Thus, the inference would be warranted that Velez' termination, even if established, was merely a pawn in Respondent's plan to rid itself of an unwanted union adherent and to validate its discharge of Serrano. *De Jana Industries*, 305 NLRB 845 (1991); *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984).

Finally, I would also note that Respondent did not terminate two employees who engaged in clearly more serious misconduct than Serrano. Thus, Respondent admitted that in the winter of 1991, a driver and a matron employed by Respondent left a young child on the bus, went to breakfast, and returned finding the child crying. Neither of these employees was terminated, which tends to show that Respondent rarely discharges employees[17] and is in my view evidence of disparate treatment, because Respondent discharged Serrano without a warning for committing an obviously less serious transgression than these two other employees.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has failed to meet its heavy burden of establishing by a preponderance of the evidence that it would have laid off or discharged Serrano absent her protected conduct. Therefore, I find that Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint.

[17] This fact is further confirmed by Cohen's testimony that Serrano and Velez were the only employees terminated by it in 1991.

B. *Case 29–CA–15893*

I have found above that 2 days after the election, Jeff Cohen told Johnson, who had been the observer for Local 1181, that she shouldn't have involved herself with the Union, because he had done favors for her in the past. He reminded her that he had allowed her daughter to work in her place so she wouldn't lose any pay, when he had attended a funeral. These remarks by Cohen constitute unlawful warnings and instructions not to get involved in union activities; *Chelsea Homes*, 298 NLRB 813 (1990); *EDP Computer Systems*, 284 NLRB 1232, 1264 (1987); as well as implied threats that Johnson's union activities would bring adverse consequences, i.e., Respondent would not do favors for her as in the past, because she had become involved with the Union. *Gino Morena Enterprises*, 287 NLRB 1327, 1328 (1988); *Ominix International Corp*., 286 NLRB 425, 427 (1987). I so find.

I have also found that Johnson filed charges against Respondent in Case 29–CA–15883 on July 30, alleging that her transfer and subsequent firing were violative of the Act. A few days later during the course of a grievance filed by her, Cohen told Johnson to leave the premises because she had gone to the Labor Board, and that she was not to report back to work until the Labor Board case was settled, even if there was work for her in September. I conclude that by these comments, Respondent has conditioned her recall from layoff on her withdrawing her unfair labor practice charges, which is violative of Section 8(a)(1) and (4) of the Act. *Contris Packaging Co*., 268 NLRB 193, 212–213 (1983). C.f. *Great Lakes Chemical Corp*., 298 NLRB 615 (1990).

A more difficult question is presented however, as to whether in fact Johnson lost any work as a result of Respondent's unlawful conduct. Although Johnson was recalled to work on September 20 to her Brookdale run, she claims that the run began operation (after the summer recess) on September 13, and was staffed by another matron, whose name she did not know. Cohen on the other hand testified that the Brookdale run started on September 20, the date that Johnson was recalled, and that no one else serviced the run. As noted, no payroll or other records were introduced into the record concerning this issue.

In my view, the record has been insufficiently developed to determine whether Johnson actually lost any work, as a result of the discrimination against her, and I shall therefore leave that question to be determined at the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. The Respondent, Robin Transportation, Ltd., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1181–1061, Amalgamated Transit Union, AFL–CIO has at all times material been a labor organization within the meaning of Section 2(5) of the Act.

3. By warning and instructing its employees that they should not get involved in activities on behalf of Local 1181, and by impliedly threatening that it would not do favors for employees as it had in the past, because the employees had supported Local 1181, Respondent has violated Section 8(a)(1) of the Act.

4. By laying off, discharging, and refusing to reinstate its employee Janette Serrano, because of Serrano's support for and activities on behalf of Local 1181, and in order to prevent Serrano from voting in a National Labor Relations Board-conducted election, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By conditioning the recall from layoff of Delores Johnson on her withdrawing her unfair labor practice charges filed with the National Labor Relations Board, Respondent has violated Section 8(a)(1) and (4) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Serrano, I find it appropriate to order it to reinstate her to her former position of employment, or if no longer available, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her as well as Delores Johnson whole for any loss of earnings suffered as a result of the discrimination against them,[18] with interest therein as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Robin Transportation, Ltd., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning and instructing its employees that they should not get involved in activities on behalf of Local 1181–1061 Amalgamated Transit Union, AFL–CIO or impliedly threatening that it would not do favors for employees as it had in the past, because the employees supported Local 1181.

(b) Laying off or discharging employees because the employees supported or engaged in activities on behalf of Local 1181 or in order to prevent employees from voting in a National Labor Relations Board-conducted election.

(c) Conditioning the recall of employees from layoff on the employees' withdrawing charges filed with the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Janette Serrano immediate and full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed.

(b) Make whole Serrano and Delores Johnson for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them in the manner set forth above in this decision.

(c) Remove from its files any reference to the unlawful discharge of Serrano and notify her in writing that this has been done and that evidence of the discharge will not be used against her in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] As noted above, I shall leave to the compliance stage of this matter the question of whether Johnson lost any work or suffered any loss of pay as a result of Respondent's unlawful conduct toward her.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial in which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we, Robin Transportation Ltd., violated the National Labor Relations Act, and has ordered us to post this notice and to keep the promises that we make in this notice.

WE WILL NOT warn or instruct our employees that they should not get involved in activities on behalf of Local 1181–1061 Amalgamated Transit Union, AFL–CIO or impliedly threaten that we would not do favors for employees as we had in the past, because our employees supported Local 1181.

WE WILL NOT lay off or discharge our employees because the employees supported or engaged in activities on behalf of Local 1181 or in order to prevent employees from voting in a National Labor Relations Board-conducted election.

WE WILL NOT condition the recall of our employees from layoff on the employees withdrawing charges filed with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Janette Serrano immediate and full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed.

WE WILL make whole Serrano and Delores Johnson for any loss of earnings or other benefits they may have suffered by reason of our discrimination against them plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Serrano and notify her in writing that this has been done and that evidence of the discharge will not be used by us against her in any way.

ROBIN TRANSPORTATION, LTD.